

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
JUNE 26, 2007 Session

ROB RENNELL v. THROUGH THE GREEN, INC., ET AL.

**Direct Appeal from the Chancery Court for Williamson County
No. 31154 Russ Heldman, Chancellor**

No. M2006-01429-COA-R3-CV - Filed March 14, 2008

This is an appeal from a bench trial for intentional procurement of breach of contract. Through the Green, Inc., a closely held for-profit corporation, was formed in 1994 by John Doerr, who served as both president and majority shareholder. Through the Green, Inc. operated as a golf course and driving range located in Franklin, Tennessee. Thomas Doerr, John Doerr's brother, served as the corporation's vice president. Rob Rennell, a professional golf instructor, entered into an oral employment contract with John Doerr in 1994 to work for Through the Green, Inc. A dispute over the terms of Rob Rennell's employment contract arose. Rob Rennell contended that he possessed a 20% ownership interest in the corporation because he had contributed five years of "sweat equity" through his work in accordance with the oral employment contract. Rob Rennell also alleged that he deferred salary in 2003 and 2004 in return for a 2 for 1 stock exchange. The corporation ceased operations in 2004, and John Doerr maintained that Rob Rennell had no company ownership interest. Rob Rennell brought suit, alleging several theories of liability, including procurement of breach of contract against John and Thomas Doerr. First, the trial court found that Through the Green, Inc. breached its employment contract with Rob Rennell. Next, the court found John Doerr individually liable for procurement of breach of contract and awarded Rob Rennell treble damages in the amount of \$1,524,000. Finally, the court found Thomas Doerr vicariously liable for John Doerr's conduct in the amount of \$508,000, jointly and severally with John Doerr. John and Thomas Doerr appeal. John Doerr alleges that 1) the chancery court erred in finding him liable for procurement of breach of contract because he, acting as president and owner of Through the Green, Inc., is not a third party necessary for such a procurement claim; 2) the chancery court erred in its calculation of damages; and 3) he is entitled to an offset for any amount Rob Rennell may collect in the future from Through the Green, Inc. on the underlying breach of contract claim. Thomas Doerr argues that the judgment holding him vicariously liable for the actions of John Doerr should be reversed because Rob Rennell neither asserted nor pled such a cause of action. In the alternative, Thomas Doerr argues that the evidence is not sufficient to support a judgment holding him vicariously liable. We reverse in part, vacate in part and remand for further proceedings.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Reversed in Part, Vacated in Part and Remanded

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and WALTER C. KURTZ, SP. J., joined.

Elizabeth H. Ferguson, Bradley A. MacLean, Nashville, TN, for Appellants

Joseph A. Woodruff, Derek W. Edwards, Nashville, TN, and P. Edward Schell, Franklin, TN, for Appellee

OPINION

I. FACTS & PROCEDURAL HISTORY

John Doerr (collectively with Thomas Doerr, “Appellants”) envisioned opening a family-friendly golf instructional center. His business plan included a golf course, driving range and teaching facility, club house, and maintenance facilities. This new business would focus on instruction for women and junior golfers, and thus, John Doerr enlisted the expertise of Rob Rennell (“Mr. Rennell”). Mr. Rennell is a PGA Class A Golf Professional and has a reputation in the golf community for his teaching skills, including winning the 1991 Tennessee PGA Teacher of the Year Award. John Doerr and Mr. Rennell met at Richland Country Club in Nashville, Tennessee, where Mr. Rennell worked as an assistant golf professional and teaching professional.

In 1993, John Doerr contacted Mr. Rennell, and a meeting was held to discuss this business concept. John Doerr did not offer Mr. Rennell an employment position at this time, but during the meeting, he did use the term “sweat equity,” meaning that if this business became a reality, Mr. Rennell could obtain ownership in the company through his work. Property was settled on as the site of this prospective business, and in the summer of 1994, John Doerr made an oral offer of employment to Mr. Rennell.¹ The employment offer was for a five year position² as the head golf professional/instructor and the director of golf. As the director of golf, Mr. Rennell would earn a salary of \$30,000 and be responsible for the overall supervision of the golf course, including managing the pro shop and hiring and firing staff. As the head instructor, Mr. Rennell would retain

¹ Mr. Rennell and John Doerr disagreed at trial as to the terms of the employment contract, including the meaning of “sweat equity.” In the final judgment, the court specifically discredited John Doerr’s testimony, including his explanation of the terms of the sweat equity contract. The court found that an employment contract existed, and the terms were as testified to by Mr. Rennell. John Doerr does not appeal this or the court’s finding that Through the Green, Inc. breached the employment contract with Mr. Rennell. Thus, we adopt the facts as accredited by the trial court.

² Appellants did not raise the statute of frauds as a defense at trial.

fifty percent of the revenues he generated from his golf lessons, with the other fifty percent going to the company. The position would be for a term of five years, and after the fifth year, Mr. Rennell could elect either a 20% equity interest in the business or a lump sum cash buyout of \$100,000. Mr. Rennell understood the offer as giving him an ownership interest in the company, including the real estate, after the five years of sweat equity. Mr. Rennell accepted after John Doerr finished making the oral offer, and the two men shook hands. The only individuals present at the time of the offer were John Doerr and Mr. Rennell.

John Doerr formed Through the Green, Inc. ("TTGI"), a for-profit closely held corporation, on October 18, 1994, with an initial capital contribution of \$500,000. John Doerr was the incorporator, president, and sole shareholder, and Jerry Wallace served as secretary. TTGI purchased the real estate, which John Doerr personally guaranteed. Initially, Mr. Rennell was named as the temporary vice president, but subsequently, Thomas Doerr served as the vice president. Mr. Rennell worked continuously at TTGI from 1994 until TTGI ceased operations around October 2004.

TTGI opened to the public in the spring of 1995, but the actual golf course did not open for use until the fall of 1995. Subsequent to TTGI's opening, John Doerr opened other golf courses in Tennessee. In 1995, John and Thomas Doerr organized Through The Green - New Hope, L.P. ("New Hope"), a limited partnership, and incorporated Through The Green of Tennessee, Inc., a corporation, as New Hope's general partner. In 1998, New Hope opened Highland Rim Golf Course ("Highland Rim") in Joelton, Tennessee. Mr. Rennell did not have any interest in New Hope or Highland Rim. John Doerr did mention at some point getting Mr. Rennell involved in Highland Rim as a 5% interest holder, but this "loose talk" never resulted in a deal.

In March of 1997, John Doerr asked Mr. Rennell if he would be willing to restructure his salary concerning the proceeds from golf lessons. John Doerr offered that if Mr. Rennell would forego his fifty percent golf lessons revenue, and let all lesson proceeds go to TTGI, he would receive a salary of \$60,000. Although Mr. Rennell believed that this deal was not economically advantageous, he accepted the offer because he felt that as part-owner of the company, he should make this sacrifice. The 20% equity or \$100,000 cash buyout provision of the initial oral employment contract remained unchanged. It was Mr. Rennell's understanding that another one of TTGI's employees, Jerry Wallace, had a "sweat equity" deal with John Doerr, whereas Jerry Wallace could earn five percent equity ownership in TTGI.

In the winter of 2002, TTGI experienced cash flow problems, and during the first quarter of 2003, John Doerr asked Mr. Rennell if he would defer his salary; in exchange, Mr. Rennell would receive two dollars in stock for each dollar of salary foregone. Mr. Rennell accepted the offer. John Doerr also made the same offer to another employee, Andy Jones, in Mr. Rennell's presence; Andy Jones refused the offer. Cash flow problems resurfaced in 2004, and again John Doerr asked Mr. Rennell to defer his salary for the two for one stock exchange. Mr. Rennell accepted.

Despite best efforts, TTGI was never a profitable venture. In 2004, Wal-Mart entered into an agreement with TTGI for the purchase of TTGI's principal asset, the real estate. In March 2004,

John Doerr met with Mr. Rennell and Jerry Wallace to discuss the sale. John Doerr discussed possible ways to minimize TTGI's income tax liability from the capital gains generated from the sale, including the possibility of a like exchange pursuant to Section 1031 of the Internal Revenue Code. John Doerr asked Mr. Rennell if he would be interested in "rolling over" his ownership interest in TTGI into John Doerr's other golf course, Highland Rim. After some thought, Mr. Rennell decided he wanted to cash out his ownership equity and begin his own golf course and teaching facilities.

A second meeting was held in April 2004, attended by John Doerr, Jerry Wallace, Mr. Rennell, and Mr. Rennell's wife, Kendra Rennell. John Doerr again brought up the issue of Mr. Rennell's interest, and Mr. Rennell handed John Doerr and Jerry Wallace a two-page business "goals" list, which stated in part:

In order to start the new academy and get my family's financial house in order, I am going to have to cash out my 20% stock ownership in [TTGI] This will give me enough capital to get the above things done. I need to know a rough approximation of what my cash out will be so I can start look [sic] for land starting Wednesday. I could use some input on how I could secure the land without having the money yet.

After reviewing the document, Mr. Doerr stated that there was nothing to "cash out" due to the losses at Highland Rim. He explained that in order to take TTGI's profits, Mr. Rennell would also have to take Highland Rim's losses. Mr. Rennell stated that he did not think that was accurate, that the two businesses were in no way related. The meeting ended with no clear resolution as to Mr. Rennell's ownership interest.

The sale of TTGI's real estate to Wal-Mart was contingent on Wal-Mart obtaining zoning approval from the City of Franklin Planning Commission. Due in part to public opposition, the city council enacted an ordinance which effectively prevented a big business such as Wal-Mart from using TTGI's property to build a mega-store. Thus, the TTGI/Wal-Mart deal fell through.

Around September 2004, John Doerr announced to the staff that TTGI would close. On October 8, Mr. Rennell and John Doerr met one last time to discuss Mr. Rennell's ownership interest. Mr. Rennell's father, Robert J. Rennell, an attorney, was also present. John Doerr denied, for the first time in Mr. Rennell's presence, that he and Mr. Rennell ever had such an oral agreement whereby Mr. Rennell had obtained any ownership in TTGI.

Mr. Rennell brought suit in the Chancery Court for Williamson County, Tennessee, on December 8, 2004, alleging several causes of action including TTGI's breach of contract; John and Thomas Doerr's procurement of breach of contract; promissory estoppel/detrimental reliance; unjust enrichment; promissory fraud; breach of fiduciary duties; and civil conspiracy. Prior to trial, TTGI entered into a contract with a third party for the sale of TTGI's real estate, and in accordance with

an agreed order dated April 22, 2005, John and Thomas Doerr deposited \$1,000,000 with the Clerk & Master of Williamson County pending resolution of the lawsuit. Chancellor Heldman conducted a bench trial commencing on May 17, 2006, and lasting until June 1, 2006.

In a final judgment entered June 16, 2006, Chancellor Heldman found that TTGI breached the employment contract with Mr. Rennell, with actual damages in the amount of \$508,000. Next, the court found that John Doerr was liable for intentional procurement of breach of contract and awarded Mr. Rennell treble damages in the amount of \$1,524,000. Finally, the court found that Thomas Doerr was vicariously liable for intentional interference with a business relationship for the conduct of John Doerr in the amount of \$508,000, jointly and severally.

II. ISSUES PRESENTED

Appellants filed a timely appeal to this Court and raise the following issues for review, which we slightly reword and reorder:

1. Whether the trial court erred as a matter of law in holding John Doerr individually liable for procuring TTGI's breach of contract with Mr. Rennell.
2. Whether the trial court erred in its calculation of compensatory damages and discretionary costs awarded to Mr. Rennell.
3. Whether Mr. Rennell properly pled or asserted the claim of vicarious liability to hold John Doerr liable for intentional interference with a business relationship based on Tom Doerr's conduct, and if so, whether the evidence is sufficient to hold Tom Doerr vicariously liable.
4. Whether John Doerr is entitled to an offset for any money recovered by Mr. Rennell from TTGI on the underlying breach of contract claim.

III. STANDARD OF REVIEW

When reviewing findings made by the trial court following a bench trial, we presume that the factual findings are correct. We will only overturn these factual findings if the evidence preponderates against them. Tenn. R. App. P. 13(d) (2007); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). The evidence preponderates against a trial court's finding of fact when it supports "another finding of fact with greater convincing effect." *Nashville Ford Tractor, Inc. v. Great American Ins. Co.*, 194 S.W.3d 415, 425 (Tenn. Ct. App. 2005); *Watson v. Watson*, 196 S.W.3d 695, 701 (Tenn. Ct. App. 2005) (citing *Walker v. Sidney Gilreath & Assocs.*, 40 S.W.3d 66, 71 (Tenn. Ct. App. 2000); *The Realty Shop, Inc. v. R.R. Westminster Holding, Inc.*, 7 S.W.3d 581, 596 (Tenn. Ct. App. 1999)). We give great weight to the trial court's factual findings concerning the credibility of witnesses, *Nashville Ford Tractor, Inc.*, 194 S.W.3d at 425 (citations omitted), and we will not re-evaluate these factual findings concerning credibility unless there exists clear and

convincing evidence to the contrary. *Sircy v. Metro. Gov't of Nashville and Davidson County*, 182 S.W.3d 815, 818 (Tenn. Ct. App. 2005) (citation omitted). On the other hand, we review the trial court's conclusions of law *de novo* upon the record with no presumption of correctness. *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993) (citing *Estate of Adkins v. White Consol. Indus., Inc.*, 788 S.W.2d 815, 817 (Tenn. Ct. App. 1989)).

IV. DISCUSSION

A. Procurement of Breach of Contract

John Doerr argues that he cannot be held individually liable for procuring TTGI's breach of contract under Tenn. Code Ann. § 47-50-109 because he was acting as the president and owner of TTGI, and thus his and TTGI's interests were the same. Hence, John Doerr contends there was not a three-party relationship as a matter of law.

We begin our analysis by looking to Tenn. Code Ann. § 47-50-109 (2001):

It is unlawful for any person, by inducement, persuasion, misrepresentation, or other means, to induce or procure the breach or violation, refusal or failure to perform any lawful contract by any party thereto; and, in every case where a breach or violation of such contract is so procured, the person so procuring or inducing the same shall be liable in treble the amount of damages resulting from or incident to the breach of the contract. The party injured by such breach may bring suit for the breach and for such damages.

This statute is simply the codification of common law, the only change being that the statute mandates treble damages in lieu of punitive damages. *Buddy Lee Attractions, Inc. v. William Morris Agency*, 13 S.W.3d 343, 359 (Tenn. Ct. App. 1999) (citing *Emmco Ins. Co. v. Beacon Mut. Indem. Co.*, 204 Tenn. 540, 322 S.W.2d 226 (Tenn. 1959); *Lichter v. Fulcher*, 22 Tenn. App. 670, 125 S.W.2d 501, 508 (Tenn. Ct. App. 1938)); *see also Shahrदार v. Global Housing, Inc.*, 983 S.W.2d 230, 239 (Tenn. Ct. App. 1998) (citing *Polk & Sullivan, Inc. v. United Cities Gas Co.*, 783 S.W.2d 538, 542 (Tenn. 1989)). The plaintiff must prove the following elements in order to recover under Tenn. Code Ann. § 47-50-109: 1) existence of a legal contract; 2) wrongdoer is aware of the contract; 3) wrongdoer's intent to induce the breach of contract; 4) wrongdoer's malicious action; 5) breach of contract; 6) wrongdoer's act proximately caused the breach of the contract; and 7) damages. *Shahrदार*, 983 S.W.2d at 238 (citations omitted). The plaintiff must prove each of the seven elements by clear and convincing evidence. *Buddy Lee Attractions, Inc. v. William Morris Agency*, 13 S.W.3d 343, 359-60 (Tenn. Ct. App. 1999). Thus, we look to see whether "there is no serious or substantial doubt about the conclusions the plaintiff is attempting to prove." *Shahrदार*, 983 S.W.2d at 239 (citing *O'Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995)).

Procurement of breach of contract can arise in the corporate setting, usually when a corporate officer fires the employee/plaintiff. The Tennessee Supreme Court has held that in these situations, the claim may only be maintained if there is a three-party relationship. In *Forrester v. Stockstill*, 869 S.W.2d 328, 328 (Tenn. 1994), the plaintiff, a former executive director of a non-profit corporation, sued two board members for inducing the breach of his employment contract. The jury returned a verdict in the plaintiff's favor, but on appeal, our Supreme Court reversed. *Id.* at 335. The Court ruled that a claim for procurement of breach of contract can be maintained only if the proof establishes that the defendants "stood as third parties to the employment relationship at the time they performed the acts found to have caused" the breach. *Id.* at 331. If the acts complained of are in the general range of that officer's authority and "are substantially motivated by an intent to further the interest of the corporation, in claims of intentional interference with employment, the action of the officer, director, or employee is considered to be the action of the corporation and is entitled to the same immunity from liability." *Id.* at 334-35. The Court noted that the "critical factors in cases concerning intentional interference with corporate employment by a director, officer, or employee are intent, motive or purpose, and means." *Id.* at 333. In *Forrester*, the Court found that the defendants did intentionally interfere, but that the means of accomplishing the interference were not inappropriate because the defendants were obligated to report the plaintiff's job performance to the executive committee. Nor did the record support a conclusion that the defendants had a malicious motive. There was no evidence that the defendant's negative remarks about the plaintiff were made "for any purpose other than their perceived best interest" of the corporation. *Id.* at 334. The Court also pointed out the insufficiency of evidence in the record to support the plaintiff's claim, including the fact that there was no proof that the officers were not acting in furtherance of the corporation's best interest. *Id.* at 334.

Subsequently, in *Nelson v. Martin*, 958 S.W.2d 643 (Tenn. 1997), *overruled in part by Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691 (Tenn. 2002),³ the Tennessee Supreme Court reiterated that if the cause of action is procurement or inducement of a breach of an employment contract under Tenn. Code Ann. § 47-50-109, then a three-party relationship must be present – "the plaintiff as the employee, the corporation as employer, and the defendants as procurers or inducers." *Id.* at 647. The court further explained that "[i]n order for there to be a three-party relationship, there must be a showing that the defendants were *acting outside the scope of their duties* as officers of the corporation *rather than on behalf of the corporation*." *Id.* (emphasis added). *Nelson* was an appeal from a motion of summary judgment, and the court held that there was no showing of a three-party

³ *Trau-Med of America* did not overrule *Nelson* with respect to the issue of procurement of a breach of contract; rather, our Supreme Court, in the *Trau-Med of America* decision, recognized the tort of intentional interference with existing or prospective business relationships, which the Court in the prior *Nelson* decision declined to recognize. *Trau-Med of Am., Inc.*, 71 S.W.3d at 701.

relationship because “the facts alleged do not show that the defendants acted other than as officers of the corporation.” *Id.*

In the present case, John Doerr contends that a three-party relationship is a requirement of the claim of procurement of a breach of contract, and thus it is a question of law that we should review *de novo*. On the other hand, Mr. Rennell contends that John Doerr is really arguing corporate immunity or privilege, and that issue is waived because John Doerr did not plead this as an affirmative defense at trial. Both of these contentions go to the issue of which party has the burden of proof. Our Supreme Court has explained that *Forrester* stands for the proposition that “a privilege [exists] against an interference of contract claim when there is *unity of interest* between the interfering party and the breaching party.” *Waste Conversion Sys., Inc. v. Greenstone Indus.*, 33 S.W.3d 779, 782 (Tenn. 2000) (emphasis added). In the situation of a parent corporation’s privilege in interfering with the contractual relationship of its subsidiary company and a third party, our Supreme Court has stated the following concerning the burden of proof:

In the case before us, the plaintiff [] is the party attempting to recover from a parent corporation that was not a participant in the contract. The plaintiff is the party affirming the facts regarding the parent’s interference with the contract as well as its unlawfulness in doing so. Therefore, once it is established that the subsidiary is wholly-owned by the defendant parent corporation . . . , *the plaintiff should bear the burden of proof to show that the parent acted detrimentally to the subsidiary’s economic interests. This fact should be demonstrated by the plaintiff in addition to the elements of the cause of action.*

Waste Conversion Sys., Inc., 33 S.W.3d at 783 (emphasis added).

We applied the aforementioned rule from the Supreme Court’s decision of *Waste Conversion Systems, Inc.* in *Nelson v. Metric Realty*, No. M2000-03204-COA-R3-CV, 2002 WL 31126649, at *9-10 (Tenn. Ct. App. Mar. 17, 2003), a case involving a claim of intentional interference with a settlement contract. In *Nelson v. Metric Realty*, the plaintiffs argued that any privilege of a corporate agent in an interference of contract suit is an affirmative defense. We disagreed, reasoning that there was no distinction between the facts of that case and the facts of *Waste Conversion Systems, Inc.* that would justify switching the burden from the plaintiff to the defendant. *Id.* at *9. Likewise, in this case we reject the argument that corporate privilege is an affirmative defense.

As to the standard of review, John Doerr cites to *Nelson v. Martin*. The Court employed a *de novo* standard of review in *Nelson* because, as previously discussed, the Court reviewed a motion for summary judgment. 958 S.W.2d 643, 646 (Tenn. 1997). It is clear that a three-party relationship is a required showing, but whether a three-party relationship exists depends on the circumstances and facts of each case, including whether the corporate officer was acting outside the general scope of his authority and for his own interests instead of the interests of the corporation. *See id.* at 647. The critical factors in making this determination, as set out in *Forrester*, include intent, motive, and

means, and “[t]hese are, of course, questions of fact.” *Dolan v. Poston*, No. M2003-02573-COA-R3-CV, 2005 SL 2402919, at *6 (Tenn. Ct. App. Sept. 29, 2005).

Next, we address John Doerr’s contention that this case lacks the three-party relationship. The case at bar poses a slightly different situation than the cases previously discussed, as Mr. Rennell was not terminated; rather, the corporation ceased operations and the president, John Doerr, refused to acknowledge Mr. Rennell’s equity interest in violation of the oral employment contract. Nevertheless, the same aforementioned principles apply. Mr. Rennell’s complaint alleges that John and Thomas Doerr were motivated to procure the breach by “their malice, avarice, and/or self-interest to improve the [Highland Rim’s] cash flow and the balance-sheet solvency of Through The Green of Tennessee, Inc. and/or New Hope” At the conclusion of the bench trial, the chancellor issued the following judgment:

The Court finds that resolution of the issues in this case depends upon the credibility of witnesses and that the Plaintiff has clearly carried his burden of proof. In particular, the Court finds that Plaintiff Rob Rennell’s testimony is more credible than the testimony of Defendant John Doerr The Court finds and concludes that an enforceable employment contract existed between Plaintiff Rob Rennell and Defendant TTGI, and that the terms of said employment contract are as testified by Rob Rennell, including that Rob Rennell was entitled to a 20% shareholder interest in TTGI from October, 1999 Plaintiff Rob Rennell has established a claim for breach of contract against Defendant TTGI Plaintiff Rob Rennell has carried his burden of proof to clearly and convincingly establish every element of a claim pursuant to Tenn. Code Ann. § 47-50-109 for intentional procurement of breach of contract against Defendant John Doerr, and therefore, enters judgment in favor of Rob Rennell and against John Doerr in the amount of \$1,524,000.00, which is treble the amount of actual damages resulting from and incident to TTGI’s breach of contract.

Thus, the court simply found that the elements of the claim were met without further elaboration. We are unable to ascertain whether the chancery court, in reaching its decision, even determined whether a three-party relationship existed. Therefore, we will look to the record to determine whether John Doerr stood as a third party to the contract between Mr. Rennell and TTGI.⁴

⁴ Mr. Rennell argues that the court expressly found that John Doerr acted with malice, and thus John Doerr can be held liable for procurement of breach of contract even if he acted within the scope of his duties. First, we would point out that we found no such explicit finding in the final judgment. “A court speaks only through its written judgments, duly entered upon its minutes. Therefore, no oral pronouncement is of any effect unless and until made a part of a written judgment duly entered.” *Sparkle Laundry & Cleaners v. Kelton*, 595 S.W.2d 88, 93 (Tenn. Ct. App. 1979) (citing *Mass. Mut. Life Ins. Co. v. Taylor Implement & Vehicle Co.*, 138 Tenn. 28, 195 S.W. 762, 765 (Tenn. 1924)).

(continued...)

John Doerr contends that there is no proof that he stood as a third party to the contract, and that “[i]f a corporate officer who acts on behalf of the corporation could be held liable for procuring the corporation’s breach of contract, then every breach of contract case against a corporation would include a potential claim against the responsible corporate officer for procuring the breach.” We agree that the facts in this case do not support a finding of a three-party relationship.

Here, there was such unity of interest that it cannot be said that John Doerr stood as a third party to this oral contract. We expressed serious doubts in *Shahrdar* as to whether a defendant so closely tied to the corporation could be held liable for a procurement of breach of contract. *Shahrdar v. Global Housing, Inc.*, 983 S.W.2d 230, 239 (Tenn. Ct. App. 1998) (stating that although the defendant was not an officer or director, “we would like to point out that we have serious doubts about whether [he] is a proper defendant for a procurement of breach action. It is abundantly clear that Global [the corporation] is controlled by [the defendant] [He] is so closely tied to the operations of Global as either an agent or ‘advisor’ that he is more akin to a *defacto* officer than a third party.”). We believe the facts in this case are such that John Doerr cannot be held liable for procurement of breach of contract between TTGI and Mr. Rennell. Our Supreme Court, in discussing its previous decision of *Forrester*, explained that a claim for procurement of breach of contract “can be alleged successfully only when the interfering party is a third party not closely tied to the operations of the breaching corporation.” *Waste Conversion Sys., Inc. v. Greenstone Indus.*, 33 S.W.3d 779, 782 (Tenn. 2000). While there is no doubt in this case that John Doerr, acting as president of TTGI, breached Rob Rennell’s employment contract, John Doerr is so closely tied to the operations of the breaching corporation that it cannot be said he stood as a third party to this contract. He was the president and majority shareholder of this closely held corporation with the authority to enter into contracts. He essentially controlled TTGI. It is “the basic principle under Tennessee law that a party to a contract cannot be held liable for tortious interference with that contract.” *Cambio Health Solutions, LLC v. Reardon*, 213 S.W.3d 785, 789 (Tenn. 2006) (citations omitted). It follows that a corporate director, officer, or employee, if acting within the scope of their authority for the interests of the corporation, should not be held liable because their action is treated as that of the corporation. *Id.* at 790.

Mr. Rennell argues that “other Tennessee courts have held corporate directors and officers personally liable for procuring breaches of their corporations’ contracts,” but this is a misstatement of this Court’s prior holdings. We have not upheld any jury verdict or bench trial judgment that has held a corporate officer liable for breaching its own corporation’s contract. In *Jenkins v. Gibbs*, No. E2001-01802-COA-R3-CV, 2002 WL 2029560, at *1 (Tenn. Ct. App. Sept. 5, 2002), the Eastern Section of this Court reviewed a motion for summary judgment on the procurement of breach of contract claim. In *Jenkins*, we found a genuine issue of material fact existed as to the motive of the

⁴ (...continued)

1917)); see also *Kotil v. Hydra-Sports, Inc.*, No. 01-A-01-9305-CV00200, 1994 WL 535542, at *4 (Tenn. Ct. App. Oct. 5, 1994) (citing *Broadway Motor Co. v. Public Fire Ins. Co.*, 12 Tenn. App. 278, 1930 WL 1696, at *3 (Tenn. Ct. App. Sept. 20, 1930)). In any event, it is clear from the context that the chancellor’s statements concerned the fourth prong of Tenn. Code Ann. § 47-50-109, which is the malice element. This is one of the elements of the claim, and is separate from the three-party relationship which the plaintiff must also prove.

defendant – whether the defendant was substantially motivated by his own interests of retaliation against the plaintiff for filing the lawsuit, or the interests of the corporation. *Id.* at * 8. Similarly, in *Lyne v. Price*, No. W2000-00870-COA-R3-CV, 2002 WL 1417177, at *2 (Tenn. Ct. App. June 27, 2002), we reviewed a Rule 12.02(6) motion to dismiss for failure to state a claim. We pointed out in *Lyne* that even if the defendant had an additional spiteful motive, he would not be liable if his actions were substantially motivated to further the interest of the corporation. *Id.* at *3 (citation omitted).

In the present case, Mr. Rennell presented no evidence as to John Doerr's intent or motive, other than the fact that if Mr. Rennell's equity interest was denied, then more money would be available to TTGI, and consequently to John Doerr for reinvestment in Highland Rim. There is no evidence that John Doerr closed TTGI or caused TTGI to fail so his other limited partnership, Highland Rim, would profit.⁵ As to the fact that John Doerr attempted to minimize TTGI's income tax, this if anything goes to show that John Doerr was acting in TTGI's best interest. The fact that he would personally benefit is incidental to TTGI's benefit. It could be said that in any decision of a president and majority shareholder of a closely held corporation, it is expected that the individual will personally benefit because the individual and the corporation's interests are one in the same. We do not believe that this alone is enough to prove that John Doerr's actions were not substantially motivated by an intent to further TTGI's interest or that he acted outside the scope of his authority. Even if John Doerr was angry that Mr. Rennell did not want to invest in Highland Rim, which could possibly indicate a spiteful motive, that is not enough to hold John Doerr liable for the procurement of breach of contract if he was substantially motivated to further TTGI's interest. There is insufficient proof in the record that John Doerr was not acting in furtherance of the corporation's interest. We hold that under the facts of this case, Mr. Rennell did not meet his burden of proof for procurement of breach of contract, and accordingly, we reverse. Therefore, we likewise reverse the holding of vicarious liability of Tom Doerr for the acts of his brother, John Doerr.⁶ Nor do we need to address

⁵ In Mr. Rennell's brief, he admits that "[t]he decision to close TTGI and sell its real estate was in and of itself reasonable, inasmuch as TTGI's real estate had appreciated many times over."

⁶ The order reads as follows concerning Tom Doerr's liability:

The Court further finds and concludes that Plaintiff Rob Rennell has carried his burden of proof to establish a claim for intentional interference with business relationship against Defendant Thomas Doerr, who the Court finds and concludes is vicariously liable for conduct by his brother, Defendant John Doerr, and therefore, enters judgment in favor of Rob Rennell and against Thomas Doerr in the amount of \$508,000.00 which liability is joint and severable with the liability of John Doerr set out herein.

Nowhere in the order does the court hold John Doerr liable for the underlying tort of intentional interference with a business relationship, and thus, we find it illogical that Tom Doerr is held vicariously liable. Mr. Rennell also argues in his brief that Tom Doerr "breached his fiduciary duty to Rob Rennell, by failing to insist that TTGI honor its obligations to him." We decline to address the issue, as the trial court did not rule on it. "This court, being a court of errors, cannot review issues not presented and ruled upon by the trial court." *Carver Plumbing Co., Inc. v. Beck*, No. 01A01-9708-CV-00377, 1998 WL 161112, at *7 (Tenn. Ct. App. Apr. 8, 1998) (quoting *King v. Now Invs., Inc.*, 1987 (continued...))

the issue of offset, as we have vacated the treble damage award. The only issue remaining deals with the award of compensatory damages and discretionary costs.

B. Compensatory Damages and Discretionary Costs

John Doerr argues that the trial court erred in calculating Mr. Rennell's compensatory damages for breach of contract because it used an overstated value of TTGI. More specifically, he contends that the court failed to deduct all of TTGI's liabilities, namely Mr. Rennell's deferred salary and severance pay, and thus "the trial court calculated the actual value of Mr. Rennell's alleged 15.3% [TTGI] interest from this inflated number, which obviously led to an erroneous and overstated value being assigned to Mr. Rennell's interest." John Doerr also contends (in a footnote in his brief) that the court erroneously precluded testimony of their expert witness, Robert Alexander.

Mr. Rennell called Robert Alexander, a CPA and business valuation expert, to testify as to TTGI's value. Mr. Alexander testified that he chose to value TTGI using the "liquidation value" as opposed to the "income approach" of valuation, because TTGI's operations had ceased. It was Mr. Alexander's opinion that Mr. Rennell's 20% ownership interest had been diluted to 15.3% by additional capital contributions made by John and Tom Doerr after 1999. Mr. Alexander estimated TTGI's value at \$2,880,000. This liquidated value was based on "the cash that ultimately will be available to TTGI's shareholders" due to the sale of the land and facilities which occurred on March 22, 2006. Mr. Alexander valued Mr. Rennell's ownership interest at approximately \$440,000 (15.3% multiplied by TTGI's value of \$2,880,000).

Not surprisingly, the Doerrs called their own expert, Leroy Wolf, a CPA and business valuation expert. Mr. Wolf did not testify as to the liquidation value of TTGI. He did testify that he calculated Mr. Rennell's diluted interest at 10.5%, as opposed to Mr. Alexander's 15.3% calculation.

The trial court found that TTGI breached its contract with Mr. Rennell, and calculated compensatory damages in the amount of \$508,000, broken down as follows:

- a. The Court enters judgment . . . in the amount of \$440,000.00, which is the value of Rob Rennell's fully diluted ownership interest in TTGI, together with pre-judgment interest at 10% *per annum*, accruing from March 22, 2006 in the amount of \$6,770.

⁶(...continued)

WL 18891, at *2 (Tenn. Ct. App. Oct. 27, 1987) (emphasis added), perm. app. denied (Tenn. Feb. 1, 1988)).

- b. The Court enters judgment . . . in the amount of \$29,000.00, which is Rob Rennell’s deferred salary for the first quarter of 2003, together with pre-judgment interest at 10% *per annum*, accruing from April 1, 2003 in the amount of \$8,941.
- c. The Court enters judgment . . . in the amount of \$29,000.00, which is Rob Rennell’s deferred salary for the first quarter of 2004, together with pre-judgment interest at 10% *per annum*, accruing from April 1, 2004 in the amount of \$6,041.
- d. The Court enters judgment . . . in the amount of \$10,000.00, which is Rob Rennell’s severance pay, together with pre-judgment interest at 10% *per annum*, accruing from October 31, 2004 in the amount of \$1,500.

We find no expert testimony in the record to support John Doerr’s argument that Mr. Rennell’s expert’s valuation, which the court adopted, inflated the calculation of TTGI’s value. Rather, it appears John Doerr is raising a new argument on appeal.

We point out that “determining the value of a closely held corporation is not an exact science” *Wright v. Quillen*, 909 S.W.2d 804, 809 (Tenn. Ct. App. 1995) (citing *Wallace v. Wallace*, 733 S.W.2d 102 (Tenn. Ct. App. 1987)). “[T]he choice of the proper method or combination of methods (to determine value) depends upon the unique circumstances of each corporation.” *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987). The liquidation value approach employed in this case is a recognized, acceptable method of valuation. See *Anderson v. Anderson*, No. E2005-02110-COA-R3-CV, 2006 WL 2535393, at *3 (Tenn. Ct. App. Sept. 5, 2006). Mr. Wolf did not give an opinion as to TTGI’s liquidated value, and the court chose to use Mr. Alexander’s opinion of the value. And as to any testimony excluded by the trial court, Mr. Rennell points out that Appellant’s counsel failed to make an offer of proof, and thus we should not consider this issue. We agree with Mr. Rennell. The record clearly indicates that no offer of proof was made, despite the fact that the judge specifically asked, “You want to make a record to support that?”, to which counsel for the Doerrs instead chose to “move on.” “[S]ince this Court has no way of knowing what proof would have been introduced, the appellate review of the [trial] court’s action is waived.” *GSB Contractors, Inc. v. Hess*, 179 S.W.3d 535, 544 (Tenn. Ct. App. 2005) (quoting *Memphis Bd. of Realtors v. Cohen*, 786 S.W.2d 951, 954 (Tenn. Ct. App. 1989)). We affirm the trial court’s calculation of compensatory damages.

Finally, John Doerr contends that the court exceeded its authority by awarding discretionary costs for all of the fees charged by Mr. Rennell’s expert witness. Specifically, John Doerr points to the charges relating to preparation for trial, travel time, and travel expense totaling \$9,627.16.⁷ Mr. Rennell concedes in his brief that the court erred in awarding these costs. We agree. Rule 54.04(2) of the Tennessee Rules of Civil Procedure provides that discretionary costs are allowable for

⁷ \$1,002.16 represents travel expenses; \$6,000 represents deposition preparation; and \$2,625 represents trial preparation.

“reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials[;]” however, travel expenses are specifically excluded. We also agree that trial preparation expenses are unrecoverable. See *Trundle v. Park*, 210 S.W.3d 575, 583 (Tenn. Ct. App. 2006). Thus, we vacate part of the discretionary costs award in the amount of \$9,627.16.

V. CONCLUSION

For the aforementioned reasons, we reverse the chancery court’s judgment as it concerns procurement of breach of contract and vicarious liability for intentional interference with business relationship. We affirm the award of compensatory damages and vacate part of the award of discretionary costs amounting to \$9,627.16. We remand for such further proceedings as are necessary and consistent with this opinion. Costs of the appeal are assessed one-half against Appellants and their surety, and one-half against Appellee, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.